

Testimony on Senate Bill 558
to
The Senate Committee on Ways and Means

Kansas Department of Agriculture

March 4, 2010

Chairman Emler and members of the committee, the Kansas Department of Agriculture is submitting this written testimony in support of Senate Bill 558.

The 1996 Legislature enacted K.S.A. 82a-1801 through 82a-1803 to provide for the reserve and disposition of monies the state anticipated would be recovered from its suit against Colorado on the Arkansas River (*Kansas v. Colorado*, No. 105 Orig., 1985-2009).

Kansas prevailed in the landmark case. The U.S. Supreme Court ruled that although the Arkansas River Compact does not mention groundwater, it does include alluvial groundwater insofar as groundwater pumping in Colorado impaired state line flows. Moreover, this is the first case in the history of interstate water litigation to result in money damages—more than \$34 million. Pursuant to K.S.A. 82a-1802, most of that money was placed in the interstate water litigation fund.

In 1998, Kansas again filed suit in the U.S. Supreme Court, suing Nebraska for its violations of the Republican River Compact (*Kansas v. Nebraska & Colorado*, No. 126 Orig., 1998-2003). Kansas again prevailed when it secured a ruling from the court that groundwater was part of the compact and obtained a favorable settlement as a result of that ruling. The Final Settlement Stipulation sets forth detailed terms for compliance with the compact. Unfortunately, Nebraska has generally failed to abide by its terms. This has forced Kansas to protect its interests through litigation. As necessary, Kansas will return to the U.S. Supreme Court to enforce the court's decree.

As the downstream state in these compacts, Kansas suffers from a fundamental disadvantage: it is at the mercy of upstream states and whether or not they comply with the compacts. Consequently, Kansas' only effective method of defending its interests on these rivers is through litigation. That litigation originates in, and is exclusive to, the United States Supreme Court. Litigation has secured permanent benefits for Kansas: it has secured the waters to which Kansas is entitled, and it has made clear that Kansas' upstream neighbors cannot pump groundwater without regard to its downstream effects.

The litigation fund allows Kansas to protect its interests through monitoring and, as necessary, through litigation. In litigation, the U.S. Supreme Court uses a special master. Litigation before the court's special master requires intense, sustained preparation for trial. For example, *Kansas v. Colorado* resulted in more than 270 days of trial. That means there were substantial legal costs, as well as costs associated with extensive expert assistance and testimony in the fields of engineering, hydrology and groundwater modeling.

As the committee is no doubt aware, the Legislature approved a lapse of \$1 million in funding in the litigation fund at the end of fiscal year 2007. The language in the appropriations bill as introduced by the governor had the intent to lapse only \$1 million in expenditures, but it was written too broadly. The entire balance in the account lapsed at the end of fiscal year 2007 and the money transferred to the state general fund. So, in essence, no money has been in this fund for three years.

The department supports this legislation to establish an enduring interstate water litigation fund. It will ensure that funds needed for litigation are available. It also will send a strong message to our neighboring states that Kansas is committed to defending its interstate entitlements.